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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:
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JUN 04 2009

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability. The petitioner seeks employment as an aviation safety officer. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner has not established that he qualifies for classification as an alien of exceptional ability, or that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and copies of previously submitted documents.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The first issue under consideration is whether the petitioner qualifies for classification as an alien of exceptional ability in the sciences, arts or business. Section 203(b)(2) of the Act does not establish a broad classification for "aliens of exceptional ability." Rather, that section of the law limits the classification to aliens of "exceptional ability in the sciences, arts, or business." The petitioner has not specified whether his occupation falls within the sciences, arts, or business. Counsel has repeatedly sidestepped the issue by referring to the petitioner simply as "an alien of exceptional ability." Therefore, the petitioner has not demonstrated that his occupation even falls within the limited scope of the classification he seeks. Nevertheless, in the interest of thorough consideration of the record, we will discuss the evidence the petitioner has submitted.

The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. We note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below. Qualifications possessed by all or most workers in a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." For example, every qualified physician has a college degree and a license or certification, but it defies logic to claim that every physician therefore shows "exceptional" traits.

In his initial submission on April 12, 2007, the petitioner did not specify which of the regulatory criteria he claimed to have met. He simply submitted copies of documents relating to his work and training. Furthermore, counsel stated that the petitioner "is a renowned Pilot . . . [who] has had an extensive and critically acclaimed career as a Pilot/Aviation Safety Officer." Counsel did not specify which occupation the petitioner seeks to pursue in the United States – that of a pilot, or that of an aviation safety officer.

In a letter dated June 17, 2008, the director advised the petitioner that the director would deny the petition unless the petitioner submitted evidence to meet the regulatory standards listed at 8 C.F.R. § 204.5(k)(3)(ii). In response to the notice, counsel protested that the notice, although dated June 17, 2008, was postmarked June 30, 2008, significantly reducing the petitioner's available response time. Counsel claims that this shortened response time reduced the petitioner's ability to obtain further evidence to support his petition. It is significant that the petitioner's appeal contains no new evidence, even though by that time several months had passed since the petitioner received the notice of intent to deny the petition. Also, the Form I-290B Notice of Appeal permits a petitioner to request an automatic one-month extension to obtain "additional evidence," but the petitioner did not take advantage of this opportunity. Therefore, it is not clear what further evidence the petitioner would have submitted if he had had more time to prepare his response to the earlier notice.

In the petitioner's response to the above notice, counsel asserted that the petitioner "is already employed at Miami International Airport as an aviation safety advisor." The petitioner did not claim to hold a United States pilot's license, nor did he assert that he intends to seek such a license. We therefore consider the petitioner to be pursuing employment in aviation safety, rather than as a pilot.

The petitioner, through counsel, claimed to have met the following criteria.

> *An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.* 8 C.F.R. § 204.5(k)(3)(ii)(A)

The petitioner submitted copies of various training certificates dated between 1986 and 2004, with translations where necessary. Examples of the training courses include "Course in Advanced Flight," Air Force of Uruguay, 1987; "C-130 Loadplanner's / Familiarization Course," United States

Air Force, 1990; and "Airport Emergency Planning," Caribbean International Airport, 1993. One course, in "Marketing Services," has no clear relevance to aviation.

Counsel stated that the petitioner's training certificates established "that the alien possesses academic degrees or diplomas relating to the area of exceptional ability."

In denying the petition on September 15, 2008, the director acknowledged the petitioner's educational background, but found: "the record does not establish that the petitioner's training is consistent with a degree of expertise significantly above that ordinarily encountered in other pilots or those working in the field of aviation safety."

On appeal, counsel asserts: "the petitioner has received numerous of [*sic*] academic diplomas in specialized training as a pilot and aviation safety officer from governmental and private institutions in Uruguay and the United States." Counsel does not address the director's finding that the petitioner offered no basis of comparison to show that the petitioner's level of training is significantly higher than what is ordinarily encountered in his field.

The materials in the record reflect the petitioner's completion of short-term training programs, rather than long-term academic courses. The petitioner has not shown that these certificates are comparable to the academic degrees contemplated in the language of the regulation. Also, only a handful of the certificates appear to relate to aviation safety.

We affirm the director's finding that the petitioner has not submitted academic records sufficient to establish exceptional ability as an aviation safety officer.

> *Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought.* 8 C.F.R. § 204.5(k)(3)(ii)(B)

We note that the regulations require ten years of experience in a given "occupation," which is narrower than a "field." A pilot and an aviation safety officer both work in the broad field of aviation, but they work in different occupations with very different duties.

On his résumé, the petitioner claimed 21 years of "Professional Working Experience," but he listed only seventeen and a half years in the Uruguayan Air Force from 1986 to 2004, interrupted by one year as an "Aviation Safety Officer" for the United Nations (UN) in Mbandaka, Republic of Congo.

Following the director's notice, counsel stated that the shortened response period did not allow enough time for the petitioner to obtain letters from his former employer. The petitioner did, however, submit translated copies of various promotion certificates, dated between 1986 and 2004, as evidence of more than a decade of service in the Uruguayan Air Force.

In the denial notice, the director found: "the petitioner has established that he has at least ten years experience as a pilot. However, the record does not reflect, nor does the petitioner assert, that he has at least ten years experience in the field of aviation safety, the field in which he is currently employed." The certificates submitted by the petitioner show only one year of aviation safety experience from July 2001 to July 2002.

Counsel devotes only one sentence of the appellate brief to the issue of the petitioner's work experience: "Because of the time restrains [*sic*] resulted by [*sic*] having only seven days to respond to the Service's notice, the petitioner was unable to obtain additional letters of employment showing at least 10 years of experience." Counsel does not claim that the petitioner has ten years of experience in aviation safety. The petitioner does not even identify any employer that employed him full-time in aviation safety, with the exception of his one year with the UN.

We agree with the director. The petitioner has established ten years of experience as a pilot, but he has not established ten years of experience as an aviation safety officer. If the petitioner seeks employment as a pilot, then he meets this criterion. If, instead, he seeks employment in the separate occupation of aviation safety officer, then he does not meet this criterion because the record shows only one year of employment in that capacity. This "split decision" does not affect the ultimate outcome of the appeal, because the petitioner has not met at least three of the regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii), either as a pilot or as an aviation safety officer.

> *Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.* 8 C.F.R. § 204.5(k)(3)(ii)(F)

The record shows that the petitioner received an "Above Average" performance rating for his work for the UN in 2001-2002, during which time he "set up and organized the Aviation Safety Unit." The petitioner submitted what counsel described as "a photo of a medal issued by the United Nations to the alien." The photograph, enlarged and somewhat out of focus, shows the legend "UN" and a world map encircled by a wreath, used as that organization's logo. The record, however, contains nothing from the UN to explain why the petitioner received the medal. It may be that he received the medal simply for serving the UN. The record does not show that the medal is a form of recognition for achievements or significant contributions to the petitioner's field.

Counsel also claimed that the petitioner's "military promotions during his 19-year military career with the Uruguayan Air Force . . . reflect recognition by this governmental institution." The record, however, does not establish that the petitioner received these promotions owing to achievements or significant contributions, rather than for the expected progression of a career as a military officer.

In the denial notice, the director found that the petitioner's "Above Average" performance rating is not sufficient evidence of exceptional ability as the regulations define that term. On appeal, counsel states that, given more time to respond to the notice of intent to deny the petition, "[t]he petitioner could have obtained more documentation regarding his mission with the United Nations. The

petitioner could have obtained additional documentation regarding his accomplishments within the Uruguayan Air Force." Counsel does not explain why the petitioner did not submit this unidentified "additional documentation" on appeal.

The assertion that the petitioner would have submitted more evidence cannot take the place of the evidence itself. We will not overturn the director's decision based on the vague claim that some type of qualifying evidence exists outside the record. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)). The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner has documented a long and apparently successful career in the Uruguayan Air Force, including a one-year tour of duty with the United Nations in Africa. The petitioner has not, however, established that he has received recognition for achievements or significant contributions as either a pilot or an aviation safety officer. We affirm the director's decision in this regard.

For the above reasons, we agree with the director that the petitioner has not established that he qualifies for classification as an alien of exceptional ability in the arts, sciences or business.

The second and final issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

The regulation at 8 C.F.R. § 204.5(k)(4)(ii) requires that a petitioner seeking to apply for the waiver must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate. The record does not contain this required document, and therefore the petitioner has not properly applied for the national interest waiver. The director, however, did not raise this issue. We will, therefore, review the matter on the merits rather than leave it at a finding that the petitioner did not properly apply for the waiver.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly

> above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

In the initial submission, the petitioner indicated on Form I-140 that he seeks a national interest waiver. Counsel, however, did not address the waiver issue in the accompanying cover letter. Rather, counsel stated that the petitioner sought classification "as an Alien of Extraordinary Ability pursuant to Title 8 CFR 214.2(o)," which is a nonimmigrant classification. Following the issuance of the notice of intent to deny the petition, counsel clarified that the petitioner seeks classification "as an alien of exceptional ability" with a national interest waiver.

Counsel stated:

> The alien seeks employment as a pilot/aviation safety [*sic*]. The alien's past work experience and prior achievements, including being selected to work for the United Nations, reflect prospective national benefit. The alien's specialized knowledge as the United Nations' Aviation Safety Officer played a major role in the success and completion of the UN mandated mission in the Republic of Congo. The waiver would serve the national interest because the alien possess [sic] skills and knowledge in the aviation industry not regularly found in U.S. workers having the same minimum qualifications.
>
> The alien's specialized abilities would benefit the aviation safety industry nationally. In fact, the alien is already employed at Miami International Airport as an aviation safety advisor. Again, we are unable to present evidence of this because we had only seven days to respond to this notice.

It is not clear why the petitioner would have no evidence in his possession to establish his employment at Miami International Airport, or why such evidence would take more than a week to obtain from his daily workplace.

More importantly, the petitioner offered no specific information or evidence to show how he would benefit the United States more than other qualified workers in his field. Certainly, aviation safety is important, but this speaks to the occupation's intrinsic merit rather than the qualifications of any one particular aviation safety specialist. With respect to the petitioner's work as a pilot, the petitioner has not explained how it would serve the national interest for him, in particular, to work as a pilot in the United States.

In denying the petition, the director acknowledged the intrinsic merit of aviation safety, but found "the record does not contain sufficient evidence regarding the petitioner's employment to determine whether or not it can be considered national in scope." The director also stated that the petitioner's "long and successful military career as a pilot in the Uruguayan Air Force" does not establish "influence on the field as a whole, either as a pilot or an aviation safety advisor."

On appeal, counsel repeats the assertion: "The alien's specialized knowledge as the United Nations' Aviation Safety Officer played a major role in the success and completion of the UN mandated mission in the Republic of Congo." Counsel adds: "The fact that the petitioner was exclusively selected to supervise the aviation safety operations for the United Nations, an international agency that promotes world peace and cooperation between all countries, reflects that he has specialized knowledge and made significant accomplishments that merit the national interest waiver."

Counsel provides no evidence to support any of the above claims, and the often-repeated assertion that the petitioner had only a week to respond to the notice of intent to deny the petition does not explain why the petitioner did not obtain further evidence during the month that passed between the denial and the filing of the appeal. The petitioner did not provide any evidence about how the UN selects personnel for missions such as the petitioner's detail to the Republic of Congo. While it is true that the UN is an important international organization, it is equally true that the UN is a very large organization rather than a highly exclusive elite. We do not unquestioningly accept the claim that an alien who works for the UN must, therefore, be an important and influential figure in his or her field.

The petitioner has not established any significant, widely-established contributions to aviation safety. The petitioner has not explained how his work as a pilot does, or even could in theory, serve the national interest to a greater extent than another competent pilot. The petitioner has simply asserted that he is an experienced pilot who briefly served with the UN as a safety officer. This is not a sufficient basis for approval of the national interest waiver he seeks. We therefore agree with the director's decision to deny the petitioner's application for the national interest waiver.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to

grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.